

BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF WASHINGTON

In the Matter of the Application  
regarding the Conversion and  
Acquisition of Control of Premera Blue  
Cross and its Affiliates

Docket No. G02-45

SPECIAL MASTER’S ORDER ON  
PREMERA’S MOTION FOR ORDER  
DIRECTING OIC STAFF TO  
WITHHOLD DISCLOSURE OF  
PORTIONS OF THE MERCER REPORT

This matter comes before me on “Premera’s Motion for Order Directing OIC Staff to Withhold Disclosure of Portions of the Mercer Report,” dated November 26, 2003. I have considered the Motion, the OIC Staff’s Response, dated December 3, 2003, and Premera’s Reply, dated December 5, 2003.

*Discussion:*

Premera requests an order prohibiting the OIC Staff from permitting any person or entity to examine, photocopy or otherwise have access to certain compensation-related information (“Redacted Data”) contained in a 14-page report prepared for Premera by Mercer Human Resources Consulting, entitled “Compensation Committee Meeting—Proposed Equity Strategy,” dated October 17, 2003 (the “Mercer Report”). Premera argues that protection of the Redacted Data is necessary to preserve Premera’s future compensation strategies from its competitors.

The Mercer Report provides details of Premera's proposed Equity Incentive Plan, including the specific amounts of equity grants to classes of Premera employees and, in some cases, to individual Premera employees. The limited portions of Mercer Report that are at issue disclose specific equity grant information related to Premera employees, including specific one-time and annual grant amounts for Premera's executive officers. Premera asserts that if such information were publicly available (as it would be if the OIC Staff granted the Seattle Times' public disclosure request), 1) Premera would be at a competitive disadvantage when seeking to hire or retain top talent; and 2) the Premera Board's projections of share price, number of New Premera shares outstanding, and salary growth, as well as its approved LTIP (all highly sensitive) would be revealed.

The OIC Staff does not generally oppose Premera's Motion, but objects only to two proposed redactions, both at page 14: 1) The OIC Staff asserts that four lines of compensation data from other managed health care companies should be disclosed. In its Reply, Premera agrees to this disclosure. 2) The OIC Staff asserts that the "Premera vs. Peer Group Median" percentage should be disclosed because it does not contain any equity grant information related to Premera employees and would not put Premera at any competitive disadvantage. Premera responds that the redacted entry reveals the Premera Directors' Total Direct Compensation as a percentage of the median of the compensation data from other health care companies. With little effort, the Premera Directors' compensation could be derived from this percentage. Further, OIC Staff did not object to the redaction of the Premera directors' recommended total direct compensation.

*Ruling:*

As Premera asserts, and the OIC Staff does not dispute, most of the Redacted Data in the Mercer Report appears to be exempt, on several bases, from public disclosure. Under RCW 42.17.31917, most Redacted Data constitute “[c]onfidential, proprietary and trade secret information” provided to the Commissioner. Under RCW 42.17.310(1)(h), most Redacted Data are “research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.” Under RCW 19.108.010 *et seq*, most Redacted Data are “trade secrets” under the Uniform Trade Secrets Act. Under RCW 48.31C.130, most Redacted Data are “[c]onfidential proprietary and trade secret information provided to the [OIC] under RCW 48.31C.020 through 48.31C.050 and 48.31C.070.” (Exemptions from disclosure are further discussed in the “Special Master’s Order on Objections to Premera’s ‘AEO’ and ‘Confidential’ Designations,” dated November 17, 2003, at pages 2-5.)

The single Mercer Report entry now in dispute between Premera and the OIC Staff provides only the recommended post-conversion “Total Direct Compensation” for the Premera Board as a percentage of the median Total Direct Compensation for “peer” health care company boards. An approximation of Premera’s recommended total direct Board compensation can easily be derived from this percentage.

Total recommended Board compensation (in contrast, e.g., with the details of executive compensation) does not, however, appear to constitute significant proprietary data or trade secrets, or to be otherwise properly protected from disclosure. Premera has not demonstrated that learning the approximate amount of Premera’s post-conversion

total direct Board compensation would be of substantial competitive value to its competitors.

One passage that OIC Staff apparently agreed was appropriate for redaction should also be disclosed. Under RCW 48.43.045(2), Premera is required to report annually “the amount of wages, expense reimbursements, or other payments” to its officers, directors, or trustees. Premera’s historical officer and director compensation is therefore already publicly available. Premera has redacted Pre-Conversion “Total Cash Compensation” and “Total Direct Compensation” for the Board of Directors from page 14 of the Mercer Report. These entries should be disclosed.

Notwithstanding the foregoing discussion, consistent with the Commissioner’s Seventh Order: Appointment of Special Master, at page 3, paragraph 8, I have consulted with the Commissioner’s advisers concerning the Commissioner’s wishes as to disclosure of the Mercer Report. The Commissioner believes that, under RCW 48.31C.130, “the interest of policyholders, subscribers, members, shareholders, or the public” may be served by publication of the Mercer Report without redaction. Decisions under this statute are appropriately made by the Commissioner himself. The Commissioner intends that Premera be afforded the opportunity contemplated under RCW 48.31C.130 for “notice and hearing under chapter 48.04 RCW.”

*Order.*

The OIC Staff shall withhold from disclosure the Redacted Data in the Mercer Report identified in Premera’s Motion, as agreed in the OIC Staff’s Response. *Except that*, the OIC Staff shall disclose the two portions of page 14 of the Mercer Report discussed in its Response (i.e., compensation data from other managed health care

companies and the percentage of Total Direct Compensation “Premera vs. Peer Group Median”). OIC Staff shall also disclose the portion of page 14 of the Mercer Report showing the Board of Directors’ Pre-Conversion “Total Cash Compensation” and “Total Direct Compensation.”

By December 22, 2003, Premera shall provide a copy of the Mercer Report, redacted pursuant to the present Order, to Carol Sureau, Deputy Director, and Heather Struss, conversion proceeding filing clerk.

By January 6, 2004, Premera shall serve and file its objections, if any, to disclosure of the portions of the Mercer Report that have been redacted consistent with the present Order and shall specify whether it requests oral argument. By January 12, 2004, OIC Staff and the Interveners shall serve and file their responses, if any. By January 15, Premera shall serve and file its reply, if any. The Commissioner will set a time for oral argument, if appropriate.

DATED this 19th day of December, 2003.

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George Finkle  
Superior Court Judge, Retired  
Special Master